referred to, seem equally applicable to actions for injuries by animals, and would relieve the owner from responsibility in such a case as *Baker* v. *Snell*. But, in view of the fact that the liability is based upon policy, the court in any given jurisdiction may properly determine its extent, and upon this ground alone can the extreme English doctrine be justified. In this connection it may be proper to take into consideration the utility of the animal, as a stricter rule may well be applied where it serves no useful purpose.[20]

Even where the circumstances subject the owner to absolute liability, however, it would seem that recovery in negligence is not necessarily precluded. In the recent case of *Gropp* v. *Great Atlantic & Pacific Tea Co.* (1910) 126 N. Y. Supp. 211, the plaintiff sued for injuries caused by driving a horse in such a negligent manner that it ran away, but on the trial secured permission to amend his complaint by inserting an allegation that the defendant's servant drove the horse in a city street, knowing it to be inclined to shy and run away under such circumstances. The court held that, as this was also an action based on negligence, the amendment was proper, one judge dissenting on the ground that, as the liability under the complaint as amended was absolute, the cause of action had been changed. Since the plaintiff proved that the defendant's servant, in the course of his employment, brought the horse to a place where he knew it might cause damage, which was an act of negligence,[21] the cause of action thus remaining unchanged, it is immaterial that the doctrine of absolute liability could have been applied.

NATURE AND CREATION OF THE RIGHT OF LATERAL SUPPORT.—The right to lateral support for land in its natural condition has generally been treated as a natural right inherent in and passing with the soil.[1] From this fundamental conception it follows that any material infringement thereof by a landowner to whom the burden of support extends, whether he be an immediately adjoining proprietor or not, is actionable,[2] irrespective of the question of negligence or due care.[3] Although the soundness of the doctrine that one cannot likewise demand support for improvements placed upon his land has occasionally been doubted,[4] the decisions have uniformly refused to recognize such a right as a

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[20]See Nichols *v.* Marsland *supra;* Jackson *v.* Baker *supra;* Lowery *v.* Walter *supra;* Cooley, Torts 706. Statutes may be considered indicative of each state's policy. See Holmes *v.* Murray (1907) 207 Mo. 413; Peck *v.* Williams (1903) 24 R. I. 583; Carroll *v.* Marcoux (1903) 98 Me. 259; Osborne *v.* Chocqueel L. R. [1896] 2 Q. B. 109; Briscoe *v.* Alfrey (1895) 61 Ark. 196.

[21]See Benoit *v.* Troy etc. R. R. Co. *supra;* Baldwin *v.* Ensign (1881) 49 Conn. 113; Mitchil *v.* Alestree (1677) 1 Ventr. 295; Hudson *v.* Roberts (1851) 6 Ex. 697.

[1]McGuire *v.* Grant (N. J. 1856) 1 Dutcher 356; see Stevenson *v.* Wallace (Va. 1876) 27 Gratt. 77.

[2]Brown *v.* Robins (1859) 4 H. & N. 185; *cf.* Birmingham *v.* Allen (1877) L. R. 6 Ch. Div. 284; see also Gilmore *v.* Driscoll (1877) 122 Mass. 199.

[3]Gilmore *v.* Driscoll *supra;* see Humphries *v.* Brogden (1850) 12 Q. B. 739.

[4]See Farrand *v.* Marshall (N. Y. 1855) 21 Barb. 409.

necessary incident to the ownership of the soil.[5] In England this fact has not prevented the courts from including the injury to buildings in the total amount of damages wherever their added weight has not been a contributing cause of the subsidence, apparently on the ground that such injuries are the proximate result of the wrongful act.[6] The American courts, however, have refused to accede to this view,[7] and have required that, before this element can be allowed, lack of due care on the defendant's part must be shown.[8] Realizing, nevertheless, that the plaintiff should be given an opportunity to protect himself against the possible consequences of his neighbor's act, they have imposed on the latter the anomalous duty of giving notice of a proposed excavation and in the absence thereof will presume that he is chargeable with negligence even though no subsidence would have occurred except for the additional burden.[9] Thus it seems that these courts, although repudiating the theory of the English cases, have in reality given the owner of improvements a more widely applicable protection. The decisions in this country, moreover, have shown a tendency to modify the strict theory of the common law and to substitute a doctrine which makes the adjoining owner's liability dependent upon the reasonableness of the use to which he puts his land.[10] Typical, perhaps, of this same attitude are those decisions which intimate that an injury which ordinarily would be *damnum absque injuria* should be considered actionable if inflicted as a result of mere caprice or actual malice.[11]

While the nature of the right to support of buildings on the land has been the subject of some judicial discussion,[12] the courts have been more concerned with considerations as to the means by which it may be acquired. That it may be created by express grant does not seem to have been questioned and no reason appears why it should not under proper circumstances arise by implication.[13] Thus, where land is sold for the express purpose of erecting a heavy structure thereon, the vendor may properly be said to have conveyed the right to so much support as the contemplated improvement would require.[14] Indeed, this doctrine has even been so extended as to impose upon the grantor the duty of anticipating future improvements greatly increasing the initial

[5]Wilde *v.* Minsterley 2 Rolles Abr. 565; Wyatt *v.* Harrison (1832) 3 B. & Ad. 871; Lasala *v.* Holbrook (N. Y. 1833) 4 Paige 169; Thurston *v.* Hancock (1815) 12 Mass. 220; Transportation Co. *v.* Chicago (1878) 99 U. S. 635.

[6]Brown *v.* Robins *supra;* Stroyan *v.* Knowles (1861) 6 H. & N. 454.

[7]Gilmore *v.* Driscoll *supra;* People *v.* Canal Board (N. Y. 1873) 2 Thomp. & C. 275; Jones *v.* Greenfield (1904) 25 Pa. Sup. Ct. 315; *cf.* Pullan *v.* Stallman (1903) 70 N. J. L. 10.

[8]Shrieve *v.* Stokes (Ky. 1848) 8 B. Mon. 453; Charless *v.* Rankin (1856) 22 Mo. 566; Foley *v.* Wyeth (Mass. 1861) 2 Allen 131.

[9]3 COLUMBIA LAW REVIEW 274.

[10]See Farrand *v.* Marshal *supra;* Radcliff's Ex'rs. *v.* Brooklyn (1850) 4 N. Y. 195; *cf.* City of Quincy *v.* Jones (1875) 76 Ill. 231.

[11]See McGuire *v.* Grant *supra;* Panton *v.* Holland (N. Y. 1819) 17 Johns. 92; City of Quincy *v.* Jones *supra.*

[12]See Commissioners *v.* Angus & Co. (1881) L. R. 6 App. Cas. 740, *cf.* opinions of Lindley and Manisty JJ.

[13]See Stevenson *v.* Wallace *supra.*

[14]Freeholders of Hudson *v.* Woodcliffe Land Co. (1907) 74 N. J. L. 355; Elliot *v.* Northeastern Ry. *supra.*

pressure.[15] In like manner, if an owner of adjoining houses severs the property, he is held to have impliedly conveyed the support necessary for the building. To hold otherwise in such circumstances, it is conceived, would be to allow him to derogate from his grant.[16]

As to whether a right of this character can be gained by prescription is a question upon which the decisions in England and in this country are not in accord. In the former jurisdiction the situation is treated as not essentially different from that involved in any case where an easement is sought to be founded upon adverse user, and consequently the doctrine is held applicable.[17] It is to be observed, however, that since a person may use his land to its furthest limits in any manner he chooses, the acts relied upon as a basis for the prescription do not constitute a direct invasion of the adjoining owner's rights and are not of such a nature as to enable him to protest against them. In fact, there would seem to be no way by which the adverse claim could be resisted except by making such an excavation as would interrupt the use to which the claimant attempts to put his land.[18] Influenced by such considerations, the American courts, in spite of *dicta* to the contrary,[19] have held the English doctrine both unsuited to the conditions in this country and out of harmony with the true theory of prescription.[20] Surely this position commends itself on grounds of policy and expediency, and is, moreover, consistent with the attitude taken with regard to the acquisition of the similar easement of light and air.[21]

A recent case, *Manning* v. *New Jersey Short Line R. R. Co.* (1910) 78 Atl. 200, presented a situation for the application of the general principles outlined above. It appears that the defendant railroad company had procured a right of way through the plaintiff's property, and question arose as to the amount of compensation to which the latter was entitled. On behalf of the defendant it was argued that the plaintiff was bound to support the defendant's land only to the extent that it remained in its natural condition and that recovery should be allowed on that basis. It seems evident, however, that since the property was acquired especially for railroad purposes and since no distinction is taken between cases where the transfer is voluntary or compulsory as a result of eminent domain proceedings,[22] it was properly held that damages should be assessed on the theory that the grantor's land was burdened with the support of such improvements as were necessary to the use for which the tract condemned was designed.

[15]Great Western Ry. *v.* Cefn Cribbwer (1894) 63 L. J. Ch. 500.

[16]See City of Quincy *v.* Jones *supra;* Commissioners *v.* Angus & Co. *supra* (opinion of Lord Selborne); Gayford *v.* Nicholls (1854) 9 Exch. 702; Tunstall *v.* Christian (1885) 80 Va. 1; *cf.* Richards *v.* Rose (1853) 9 Exch. 217; Lampman *v.* Milks (1860) 21 N. Y. 505; Sanderfin *v.* Baxter (1882) 76 Va. 299; But see Palmer *v.* Fleshees (1664) Siderfin 167.

[17]Commissioners *v.* Angus & Co. *supra;* see Wyatt *v.* Harrison *supra;* Partridge *v.* Scott (1838) 3 M. & W. 220; Hide *v.* Thornborough (1846) 2 C. & K. 248; *cf.* Rogers *v.* Taylor (1858) 2 H. & N. 828.

[18]Commissioners *v.* Angus & Co. *supra* (opinion of Lord Penzance).

[19]See Thurston *v.* Hancock *supra;* Lasalla *v.* Holbrook *supra;* City of Quincy *v.* Jones *supra;* Richardson *v.* Vermont Ry. (1853) 25 Vt. 465.

[20]Mitchell *v.* Mayor of Rome (1873) 49 Ga. 19; Trustall *v.* Christian *supra.*

[21]See Gilmore *v.* Driscoll *supra;* Handlan *v.* McMannus (1890) 42 Mo. App. 551.

[22]Elliot *v.* Northeastern Ry. *supra.*